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Issue Date: 10 September 2004

CASE NO.: 2003-LHC-1691
OWCP NO.: 6-176938

In the Matter of:

MICHAEL QUINN,
Claimant,

v.

EASTERN SHIPBUILDING CO.,
Employer,

and

CLARENDON NATIONAL INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Ronald S. Webster, Esq.
For the Claimant

Paul A. Herman, Esq.
For the Employer

Neil A. Morholt, Esq.
For the Director

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking

permanent total disability benefits from March 1, 2003, or, in the alternative, additional permanent partial disability benefits from that date.[1]

A formal hearing was held in this case on October 21, 2003 in Orlando, Florida at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant offered exhibits 1 through 21 which were admitted into evidence. Employer offered exhibits 1 through 17 which were admitted into evidence. ALJX 1 and 2 were marked for identification and admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated (Tr. 5-7; ALJX 2) and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at all relevant times.
3. Claimant sustained an injury on August 7, 1998 arising out of and in the course of his employment at Eastern Shipbuilding Company in Panama City, Florida.
4. A timely notice of injury was given by Claimant to Employer.
5. Claimant filed a timely claim for compensation.
6. Employer filed a timely first report of injury and notice of controversion.
7. Claimant's August 7, 1998 injury resulted in disability.
8. Employer voluntarily paid compensation to Claimant for temporary total disability from August 8, 1998 to February 28, 2003 at $246.12 per week; for permanent partial disability from March 1, 2003 to September 19, 2003 at $73.32 per week; for permanent partial disability from September 20, 2003 to October 11, 2003 at $42.12 per week, and from October 11, 2003 to present at $16.42 per week.
9. Claimant reached maximum medical improvement ("MMI") following his first surgery on August 26, 1999 and following his second surgery on February 19, 2002.
10. Employer voluntarily paid medical benefits under Section 7 of the Act to Dr. M. P. Stringer of the Bay Medical Center and Dr. D. Johns of the Gulf Pines Hospital, in the total amount of $78,856.11.
12. Claimant's average weekly wage at the time of the injury was $369.18, yielding a compensation rate of $246.12.

II. ISSUES

1. The nature and extent of Claimant's disability.

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, "Tr." for Transcript, "Cl. Br." for Claimant's Post-hearing Brief, and "Emp. Br." for Employer's Post-hearing Brief.

2. Employer's liability for penalties, interest, and attorney's fees.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

Bertha Quinn

Claimant's wife, Bertha Lavarne Quinn testified that she has been married to Claimant for fifteen years and they have two children. Tr. 21-22. She grew up in Port St. Joe, Florida and knows the area well. *Id.* She testified that whenever Claimant is released from jail, he will return to the Port St. Joe area. *Id.* She works for the city as a trash truck driver. Tr. 21-22.

Quinn described Claimant's job history prior to his accident as working in residential construction, plumbing, and maintenance at Port St. Joe High School. *Id.* She testified that all of Claimant's jobs involved heavy lifting and heavy-duty work. Tr. 23. She added that even when Claimant worked for his mother at her restaurant as a bus boy, he had to "lift up like 50 pounds, bags of flour and sugar, bending, picking up a lot of dishes, dirty dishes, heavy pans, basically heavy work." *Id.* He never worked as a hotel clerk, manager of a fast-food business, mail carrier, cashier, or held a similar job. *Id.* He never had to work with money. *Id.* She added that although Claimant previously tried to cook, he "can't cook." *Id.*

Quinn testified that Claimant had been incarcerated for selling drugs at least three times prior to his August 1998 accident. Tr. 24. She testified that Claimant smoked crack cocaine but never sold drugs. *Id.* She acknowledged that he was in and out of custody during 1991 through 1993 and was incarcerated for two years from 1994 to 1996. *Id.*, EX 3. She visited Claimant while he was incarcerated only once because she did not like visiting prisons. Tr. 25.

Quinn testified that when Claimant was last released from custody, he returned to his job in construction. Tr. 26. She stated that Claimant was injured while working as a welder for Eastern Shipyard in Panama City as part of his rehabilitation program, which he did for about six months. *Id.*

Quinn testified that after Claimant's first surgery, he could not walk and Dr. Stringer performed tests which showed that his disks were "real bad." Tr. at 28. After his second surgery in June of 2001, Claimant was also in "bad" condition and needed help with tying his shoes and getting into and out of bed and the shower. *Id.* at 29.

After Claimant's first surgery, he began using a cane. Tr. 30. After the second surgery, he continued using a cane and got a back brace. *Id.* According to Quinn, when Claimant was transferred to the Morhaven prison facility, his cane and back brace were taken away in order to make him work. *Id.*

At the time of his injury, Claimant was in a rehabilitation program and was on probation. *Id.* After he got hurt, he stayed at home under house arrest because he could no longer work in

the program. Tr. 30-31. He eventually violated the terms and conditions of his house arrest and was sent to prison for the remainder of his sentence. Tr. 31.

Quinn acknowledged that she has not been able to observe Claimant's condition since his last incarceration. *Id.* She testified, however, that he calls her three times a week and, based on these conversations, she does not believe that his physical condition has improved. *Id.* She explained that he is in constant pain and experiences right-sided numbness. *Id.*

Quinn testified that many residents of Port St. Joe work in Panama City located only 36 miles away. Tr. 34. There is no public transportation between the two cities. *Id.* Before Claimant went to prison, he used to work in Port St. Joe, while her job was in Panama City. *Id.*

Quinn acknowledged that Claimant never tried to obtain a job as a hotel clerk or a cashier, or to work in fast food or mail service. Tr. 35. In her opinion, he would not be able to perform these jobs because he lacks relevant experience. *Id.* She added that Claimant liked to do plumbing, construction, maintenance, and yard work. Tr. 36. He was a good worker, was able to take direction, and was never late for work. *Id.*

Quinn testified that Claimant has been in prison since 2001 and has been transferred repeatedly. Tr. 39.[2] She expected him to be released from prison "10 days a month" starting in July or August 2004. *Id.* at 40.

Quinn further testified that, to her knowledge, Claimant was no longer using drugs at the time of his latest incarceration for violating house arrest. *Id.* She added that when he violated his house arrest by going to the store, he was not on drugs, but rather "was just in so much pain, he just had to walk." *Id.* She acknowledged that Claimant was in better health since he stopped smoking crack cocaine. *Id.*

Leslie Ann Gillespie

Leslie Gillespie is a vocational rehabilitation specialist and her office is located in Pace, in the Panhandle area of Florida. She testified that she is familiar with the Panhandle area, including Port St. Joe, as she has lived between Pensacola and Tallahassee for the last 32 years. Tr. 33.

Gillespie testified that she has a bachelor's degree in social work from Florida State University and a master's degree in education from the University of West Florida. Tr. 52-53; CX 20. She is certified as a vocational evaluator, rehabilitation counselor, and case manager, and is a senior disability analyst and diplomate with the American Board of Disability Analysts. Tr. 53; CX 20. She is also licensed in the State of Florida with the Division of Workers' Compensation as a rehabilitation provider and a vocational evaluator. *Id.* She has testified in a variety of venues, including several Federal and State courts, in cases involving personal injury, workers' compensation, and Social Security disability claims.

[2] She testified that he was transferred from Gulf County to Bay County, to Morhaven, Florida, to Ft. Meyers to Charlotte, and finally to Everglades, Miami. *Id.*

On *voir dire* examination by Employer's counsel, Gillespie stated that she had testified in approximately 20 or 25 cases involving LHWCA claims. Tr. 54. LHWCA cases constitute a very small percentage of her practice, since up to 60 percent of her work involves providing vocational evaluation and job placement services under a contract with the State of Florida. Tr. 54-56. Up to 40 percent of her practice is devoted to workers' compensation cases. Tr. 55. Close to 75 or 80 percent of her litigation-related practice involves work for plaintiffs, but she also works for defendants. Tr. 55-56. She charges a flat fee of $1,250 for state and $1,750 for federal cases. *Id.*

Gillespie testified that she has reviewed various medical records concerning Claimant's injuries, including the notes of Dr. Merle Stringer and Dr. Douglas Stringer, the medical records from the Department of Corrections regarding his current complaints, and physical therapy and diagnostic reports. Tr. 59. She also reviewed the labor market surveys prepared by Sheryl West and Steven R. Cooley, Employer's vocational experts, and information regarding Claimant's criminal convictions. *Id.*

Gillespie testified that she performed a vocational assessment of Claimant's ability to return to the labor market in light of the various factors affecting his employability, such as his injury, pre-injury criminal convictions, IQ, and education. *Id.* On two or three occasions she spoke to Claimant on the phone, and she also asked him to complete some paperwork regarding his employment history. On this basis, she performed a transferable skills analysis as well as an extensive labor market research in the Panhandle area of Florida. *Id.*

Gillespie next described her evaluation process and conclusions. She first ascertained what physical restrictions had been imposed on Claimant by his physicians and how they "applied under the Dictionary of Occupational Titles." Tr. 60. In formulating her opinions, she relied on a note, dated February 19, 2002, in which Dr. Stringer stated that Claimant had reached MMI and imposed permanent restrictions of no lifting over 20 pounds and no climbing or bending. *Id.* She was aware that Claimant had no physical restrictions related to his wrist fracture. *Id.* She concluded that Claimant would be able to work, at best, in a restricted light-duty capacity as defined by the DOT based on his limitations of no climbing or bending, and that those restrictions would preclude certain jobs in the light and sedentary range of work. *Id.*

Gillespie testified that she next considered Claimant's employment history. She testified that he has done labor-intensive work since graduating from high school, including construction, maintenance, roofing, tarring, cutting grass, and plumbing. Tr. 61. He "essentially has worked as a laborer" and, for a few months, as a tack welder. *Id.* He also worked as a carpenter's helper and a plumber's assistant. *Id.* Thus, according to Gillespie, Claimant has never been a lead worker, but rather a "helper worker." *Id.* She added that he has an IQ of 88, according to Mr. Cooley and the prison records documenting Claimant's Beta 2 revised examination which she identified as an objective measurement of intellectual functioning. *Id.* She concluded that "[g]iven all that information, certainly his ability to learn material is going to be significantly limited." *Id.* at 62.

According to Gillespie, Claimant "has no transferable skills." *Id.* His employability is also limited by his significant criminal history, current incarceration, and lack of a driver's

license. *Id.* She reiterated that these factors must be considered in combination with the residuals of his injury, including his spinal fusion and medically imposed physical restrictions. *Id.*

Gillespie testified that she next assessed Claimant's vocational potential in light of the aforementioned factors. *Id.* She concluded that, given his physical restrictions, he could not return to work as a welder or perform other Longshore jobs even with modifications. Tr. 62-63.

Gillespie testified that she next did a labor market survey "to see what his options were, given his current education." Tr. 63. She testified:

> I have reviewed jobs from the Pensacola to Panama City area, looking through the northwest Florida area actually, even going as far as into Mobile, Alabama.
>
> I have looked at everything from making personal phone calls to employers, looking at newspaper ads, getting on the internet and doing searches, calling job lines. I was not able to find any jobs that he [would] have the capability of doing, given his overall vocational profile.

Id.

Gillespie testified that Claimant's capacity for retraining is extremely limited because he has done nothing but labor-intensive work, has an IQ of 88, and had limited schooling (*i.e.*, a small high school in a very small town). Tr. 63. Thus, he "at best would be capable of doing vocational technical-type of training," which would train him for jobs that are outside of his physical capacities. Tr. 64. Consequently, the probability of improving Claimant's employability through training is extremely limited. *Id.*

She further testified that Claimant's last option would be self-employment. She noted that he has been self-employed in the past, but was doing plumbing and carpentry work as a handyman, was not licensed or bonded as a general contractor, and did work "as he was able to pick it up." *Id.* She concluded that self-employment is not a viable option because he is physically incapable of doing this type of work.

Gillespie testified that her overall conclusion was that "given his whole profile of who this man is, who he was before the injury, and then tacking on the spinal fusion that resulted from the injury, tacking on the physical limitations imposed by his treating physicians, we have a gentleman who is not employable at this point." *Id.*

Gillespie testified that a felony conviction of any kind is going to have a "huge impact upon employment," and Claimant's convictions for selling cocaine eliminate any jobs that involve access to money or inventory, such as sales, cashiering, or working at a highway toll booth. Tr. 65. Similarly, she opined that he would not be allowed access to children, elderly, or disabled individuals. Tr. 66, 77. Thus, he cannot work as a custodial worker in a nursing home, a child care center, or even the State Department of Children and Families. Tr. 66.

Gillespie reviewed the list of jobs proposed by Employer's vocational experts, Mr. Cooley and Ms. West, and concluded that they were not appropriate for Claimant. *Id.* In particular, she found several assistant manager positions at a convenience store and a maintenance worker position at Early Education and Care, Inc. were unrealistic job opportunities in light of Claimant's criminal background. *Id.* She opined that the position of interview clerk at the Health Department was also precluded by Claimant's low average intellectual functioning and his lack of training for Windows-based computer programs in light of the data entry requirements of the job. *Id.* Gillespie noted that the list of jobs identified by Employer's experts also contained a number of cooking positions that are medium-duty work and involve lifting up to 50 pounds. Tr. 67. She noted that these jobs were included

> Apparently based on Mr. Cooley's assumption that [Claimant] can do medium work because he worked at the prison [on] a prison road crew, but was unsuccessful doing it, and in fact his leg went out on him, he was on bed rest for two days, and then he was transferred to another facility because he couldn't do the work anymore.

Id.

Gillespie further noted that the suggested list of jobs included jobs as a hotel front desk clerk at high-end condominiums, which she believed were inappropriate for someone with prior convictions for selling cocaine since they would allow access to credit card information. *Id.* Gillespie further opined that the list contained many jobs that are outside of Claimant's medical restrictions. *Id.*

On cross-examination, Gillespie testified that she felt some of the suggested jobs were inappropriate based solely on Claimant's physical restrictions, intellectual limitations, or criminal convictions, while other jobs were precluded by a combination of all of these factors. Tr. 69.

Gillespie acknowledged that her written report did not reference Cooley's reports because she did not review them until the morning of the hearing. Tr. 69. She reviewed reports prepared by Cooley dated October 1 and May 5, 2003. Tr. 70.

Gillespie further testified that although her report does not list Dr. Stringer's deposition testimony, she did review this document. *Id.* She believed that Dr. Stringer imposed a 20-pound weight limitation and, thus, only looked for jobs which would be consistent with that limitation. *Id.* She acknowledged that a 50-pound weight restriction falls within the medium work range, while a 20-pound limitation falls under light duty, as defined by the DOT. *Id.* She testified that 89.1 percent of the jobs in the national labor market are considered to be either light- or sedentary-duty jobs, and that adding medium duty jobs would further increase the applicable labor market. *Id.*

Gillespie testified that she has been successful in finding jobs for people with physical, mental, and academic capacities similar to those of Claimant but without the other limitations involved in this case. Tr. 73. She made certain assumptions about Claimant's academic level

based on his job history and intellectual capacity. She assessed his intellectual capacity by talking to him on the phone, examining his writing, questioning his wife, and reviewing various records, including the results of the Beta 2 Revised Examination that showed intellectual functioning in the low average range with an IQ of 88. *Id.* She concluded that "[b]ased on his intellectual functioning and his labor-intensive occupations since high school, it is very likely that he is not functioning anywhere near the high school graduate level, in terms of his academic skills." Tr. 74. She testified that certain tests would be necessary to determine his actual academic standing, and added that she did not administer such tests in this case. *Id.*

Gillespie acknowledged that she has been able to find jobs for individuals with intellectual, academic, and physical limitations similar to Claimant's, but without his criminal background, albeit "[e]xtremely rarely." Tr. 75. She explained that these limitations alone "eliminate[] a huge majority, a huge percentage of the labor market." Tr. 76. She added that "unless you can look at something in terms of sheltered employment, employment options are going to be extremely limited." *Id.* She added that "I'm not going to say that there aren't any jobs [with these capacity limitations]. What I am going to say is that his potential to compete for them is going to be extremely limited." *Id.*

She added that Claimant's criminal history would prevent him from obtaining jobs that are related to security or which require a bond. *Id.* Warehouse work is precluded by his physical limitations and prior convictions. *Id.* The same two factors would preclude him from obtaining a number of salesperson or stock clerk positions. *Id.*

Gillespie acknowledged that she never spoke to Claimant's doctors or any prison personnel. Tr. 78. Her conversation with Claimant was a three-way phone call with Claimant's wife which lasted about 10 to 15 minutes. Tr. 78-79. She never met Claimant in person, but did speak to his wife on three occasions prior to this hearing. *Id.*

Michael Quinn

Claimant testified by means of a deposition, which took place on October 30, 2003 at the Everglades Correctional Institution in Miami, FL. CX 21 at 2, 4. He testified that he had been transferred to this facility three weeks earlier. *Id.* at 4.

Claimant has been continuously incarcerated since December 18, 2001 and has been moved to different facilities six or seven times. CX 21 at 5. In the six months preceding his deposition, he had been at the Everglades facility and Fort Myers Work Camp located in Charlotte County, Florida. *Id.*

Claimant testified that he normally resides in Port St. Joe, where he has lived his entire life. CX 21 at 5. He is married to Martha Quinn and has two children. *Id.* He graduated from high school in Port St. Joe, which was the last educational institution he attended. *Id.* at 5-6. He explained that he was in a special education class "for slow learning disability." *Id.* at 6. When Claimant was asked whether he, in fact, has a learning disability, he stated: "Yeah. I think I'm a little slow." *Id.*

With respect to his employment history, Claimant testified that after high school he worked at a chemical plant and did construction work in Jacksonville. CX 21 at 6. After he got married, he returned to Port St. Joe where he worked as a maintenance worker and a carpenter's helper for the Gulf County School Board and as a laborer for ChemRock and R&R Maintenance. *Id.* In the 1990s, he worked as a laborer for Woods Construction company, doing stucco and concrete work. *Id.* From 1992 through 1994, he worked in construction and did "on-the-side plumbing jobs" as a handyman. *Id.* at 8. During 1995 and 1996, he worked as a plumber's assistant for David Pearcy Plumbing and later did "some construction as a handyman." *Id.*

Claimant testified that his last job was with Eastern Ship Building as a tack welder where he worked for about 90 days. CX 21 at 8. He took a tack welding class for about one week and immediately thereafter began working as a welder in ship construction. *Id.* at 8, 10. According to Claimant, this was heavy-duty work since he was "dealing with a lot of weight and steel." *Id.* at 9.

Claimant stated that he never previously worked as a cook. CX 21 at 9. He did work in a restaurant run by his mother. Claimant testified:

> I never been a cook. My mom ran a restaurant, and at times she would have to serve 2- or 300 people. And she might call in for somebody to get the trays right or deliver the dinner or something like that, but I never did any cooking.

Id.

According to Claimant, prior to his August 7, 1998 accident, he was in good health and did not have any major health problems. CX 21 at 9.[3] He had had three felony convictions before the accident. *Id.* at 11. He was in a drug rehabilitation program and residing in the Keaton House, a halfway facility, at the time of the accident. *Id*. He was unable to complete the program due to his injury. *Id.*

Claimant testified that he was treated primarily by Dr. Doug Stringer and his twin brother, Dr. Merle Stringer. CX 21 at 13. They performed his two surgeries. *Id.* According to Claimant, after the first surgery, there was no improvement in his physical condition. *Id.* He still had numbness in his right leg, and his back "was just no good" because of numbness, circulation problems, and sharp pains in his lower back radiating through his right hip down to his toes. *Id.*

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[3] He described this accident as follows:

> Well, I went to work that day and it was raining. It started raining somewhere around two o'clock . . . . They was letting us off a little earlier. It had flooded the area to get to the time clock. You couldn't see in it , so we had to wade water to get out. There was steel or something laying on the ground. . . . Flat steel on the side. When I was wading through the water, I stepped on the steel, not being able to see it because of the raised water. I slipped. When I fell, I broke my wrist and damaged my back at the same time.

Id. 10.

Claimant testified that his condition did not improve after his second surgery. CX 21 at 13. He underwent physical therapy after both surgeries. *Id.* 14-15.

Claimant's last incarceration was for selling cocaine and, after he was released, he violated parole and was returned to prison. CX 21 at 15. During his latest incarceration, which began in December of 2001, he was in Moore Haven, Florida and did not perform any work for the first 15 to 18 months. *Id.* He explained:

> I was assigned to a houseman, but I have to be assigned to a job in order for me to get my gain time, which make me leave early.
>
> But I had a no-work pass. I had a no lifting, no standing, cane pass. I didn't do nothing there.

Id. 16. He added that working in prison raised the possibility of early release. *Id.* 17.

Claimant testified that in Moore Haven he had been using a cane and a molded back brace prescribed by Dr. Stringer, which he was supposed to wear for six months after his second surgery. CX 21 at 17. He added that there is still a bone stimulator inside his back, which has to be removed. *Id.* 19.

Claimant was next transferred to a work camp in Fort Myers, Florida where he spent ninety days. CX 21 at 19. With respect to his work experience at this facility, Claimant testified:

> I was assigned to the DOT squad, DOT 5. I never went to work for one day because of my medical problems.
>
> So they kept me there. I dumped ashtrays off the tables for three months. Never went outside the gate to any work squad. I never did anything because of my medical problems. I was going back and forth to the doctor.

Id. Claimant testified that he was having "the same kind of [back] problems [at Forty Myers] that I am having now: Stiffness, sharp pains, some days I can't move, some days I can, leg going numb, collapsing on me." *Id.* 20. He explained that the doctor took him off the DOT squad because the kind of work performed did not meet the restrictions included in his "pass," *i.e.*, no prolonged standing, bending or twisting, and limited lifting. *Id.*

Claimant testified that he stopped wearing his back brace after he was sent to a specialist while at the Moore Haven facility. CX 21 at 21. He was told that he had to stop wearing the brace after six months because it was making him stiff and he had to learn to do without it. *Id.*

Claimant was next transferred to Charlotte County Correctional Institution where he was "assigned again to an outside squad, cutting grass, that kind of stuff." CX 21 at 21. However, he did not do any work because of his medical "passes." *Id.* He added that "[t]hey was going to work around my passes. They said they'll find something for me to do, but they couldn't find anything that I could do. The doctor took me off that job. They gave me some more passes and took me off the job." *Id.*

At the Charlotte facility Claimant was assigned to a "houseman," *i.e.*, a person in charge of assigning work to individuals with disabilities. *Id.* at 22. Claimant testified: "It mostly might be 20 of us in the house dusting window sills or something like that, something light, for five minutes, ten minutes a day." *Id.* The rest of the day he would "[l]ay down or do what I have to do to make it through the day." *Id.*

Claimant was next transferred to the Everglades Correctional Institution where he was again assigned to a houseman. *Id.* He testified that he would rather be doing a different job because he is used to physical work, such as cutting grass. *Id.* With respect to his emotional attitude since the transfer, he stated:

> It's been kind of bad on me lately. I had to actually go to mental health because of depression.
>
> I can't do anything. I've been messed up for five years. I can't do anything I see other guys doing like working out, lifting weights, running the track, walking the track, doing different kind of jobs, going outside to work.
>
> If I was able to work in minimum custody, I can go outside and work, at least I don't have to be behind the fence. I've been dealing with some depression because of this.

Id. at 23-24. At the time of his deposition, Claimant was taking Prozac (30 milligrams) prescribed for his depression by a psychologist. *Id.* at 24.

Claimant testified that during his last appointment with Dr. Stringer on October 23, 2001, he complained of muscle spasms, which made his lower back "tight like a drum" and caused a lot of pain. *Id.* He added that before his incarceration he had injections in his back prescribed by Dr. Stringer, which did not help. *Id.* at 25.

Claimant testified that he does not have a valid driver's license and has never had a light-duty desk job. CX 21 at 26. He added that he is unable to perform any of the jobs he had since high school because: "I know my body. I know what I'm going through with pain, just everyday pain and everything." *Id.*

Claimant testified that he will be released from prison in August of 2004 if he can get all his "gain time" for work performance. CX 21 at 26. Prisoner's earn "gain time" at a rate of up to ten days a month depending on how well they are able to perform their assigned duties. *Id.* at 27.
Claimant testified that he had a no-work pass and "[w]hen you get a no-work pass, they have to give you your gain time, because I'm under the doctor, so they're allowed to give me my ten days." *Id.* at 29. He had accumulated eighty-seven days to be subtracted from his sentence. *Id.*

Claimant was first convicted of a crime in 1987 when he was convicted for misdemeanor driving under the influence. *Id.* He was not imprisoned, but his driver's license was suspended. *Id.* He was next convicted around 1991 for selling cocaine, was placed under house arrest after two months in jail, but was then returned to jail after violating his probation. *Id.* at 32. After

serving 87 days, Claimant returned home and worked until he was again incarcerated for probation violation. *Id.* at 33. After he was released, he performed construction work for Woods Construction. *Id.* at 34. He did not have a valid driver's license because he never got his license "straight" after his DUI conviction. *Id.* He did, however, get a temporary license in 1996 and commuted to work at Pearcy Plumbing *Id.* 35. After his temporary license expired, he never got a license because he could not attend a required class due his arrest. *Id.* at 35, 40. For a while he got to work by getting rides from others, but eventually he lost his plumbing job in Panama City because he was unable to commute. *Id.*

Claimant was convicted for the fourth time in 1994, again for selling cocaine. He spent seven months in custody at a drug treatment center. CX 21 at 37. He explained that he used crack cocaine (and, in the past, white powder cocaine), but did not use any other drugs. *Id.* at 38. The treatment program helped him "to a certain extent." *Id.* He was subsequently released and sent to work in Tallahassee Community Control Center for six months where he did mostly maintenance work, such as cutting grass, stacking and setting up tables, and cleaning floors. *Id.* He was then transferred to "Panama City work release" for about ten months, where he did plumbing work. *Id.* at 39. After he was released, he kept this job for a few months, but had to leave after his temporary driver's license expired because he could no longer commute. *Id.*

Claimant further testified that his next conviction was also for selling cocaine. CX 21 at 41. At that time, he was sent to a drug program at Keaton House in Panama City. *Id.* At that time he was no longer using drugs, but continued to sell them. *Id.* 41. He explained that he was sent to a drug rehabilitation program because he was "addicted to selling cocaine," that is, "addicted to money" since his jobs paid very little. *Id.* at 42.

After his work-related accident, Claimant stayed home and got treatment, but he was rearrested after he violated probation by being absent from home without leaving a note regarding his whereabouts. CX 21 at 44. He added that he continued to sell cocaine after his accident, but was never caught. *Id.*

Claimant testified that he is able to read and write "to a certain extent." *Id.* 45. He can only read certain words in newspapers and magazines. *Id.* He is able to count money and make change, but not well enough to work for somebody else because he is a little slow. *Id.* He had an IQ test while incarcerated, and his score put him at a fourth grade level. *Id.* 48. His past employers considered him a good worker and he took pride in his job. *Id*. As a welder for Eastern Shipbuilding he was making $7.00 an hour. *Id.*

According to Claimant, he was supposed to have a "box" which had been implanted in his back removed six months after his second surgery, but it did not happen because he was rearrested. CX 21 at 49. Since he has been incarcerated, he has been seen by a "specialist" in Jacksonville, by Dr. Luporino in the North Florida Reception Center, and by a female physician at Moore Haven. *Id.* 50. during the six months he spent at Fort Myers, he also saw Dr. Lane once or twice a month and received medication. *Id.*

Claimant reiterated that he had a doctor's pass at all facilities at which he was incarcerated and, as a result, never went out with any work crew to do physical work. CX 21 at

51. Since being incarcerated, he has not done any such work, except on one occasion at the Charlotte County facility when he was assigned to the outside grounds. *Id.* He testified that "they sent me out there messing with the lawn mowers or whatever. I wasn't pushing the lawn mowers but I was on the garbage run, picking up the bags for like a day or so. They took me off that. I went back to the doctor and I had to go to the emergency room from there." *Id.* Claimant further testified that when he was assigned to clean ashtrays, he did it every morning. *Id.* 52. At the Everglades facility he was assigned to a houseman, but has not done any work because he did not get any assignments. *Id.*[4]

According to Claimant, doctors cannot do anything else for his back problem. CX 21 at 54. He is currently taking Ibuprofen, which is the strongest medication they will give him although they gave him "muscle relaxer" at Moore Haven. *Id*. 55.

Claimant testified that his current limitations are: no frequent bending, no frequent twisting of the back, no prolonged standing (30 minutes each hour), no lifting above 30 pounds, and "low bunk" (so he would not have to climb up on the bunk), and he stated he would be willing to try a job within these limitations after his release. CX 21 at 55.

Claimant testified that he talks to his wife two or three times a week. CX 21 at 59. He also had two 15-minute telephone conversations with Ms. Gillespie. *Id.*

Steven R. Cooley

Steven R. Cooley testified by deposition on November 13, 2003. EX 12. He has been a self-employed general practitioner in vocational rehabilitation since 1984, and he works out of St. Petersburg, Florida. *Id.* at 3-4. He is licensed in Florida and two other states as a rehabilitation provider. *Id.* He is also Board Certified as a rehabilitation counselor, vocational evaluator, case manager, and life care planner, and he is a fellow of the American Board of Disability Analysts. *Id.* He has had some experience with LHWCA claims. *Id.*

Cooley testified that Claimant's file was referred to him around March 7, 2003 by Carol Aaron, a senior claims adjuster for North American Risk Services, to assess Claimant's employability. EX 12 at 4. His sole report generated in this case is dated May 5, 2003 and is based on his labor market survey performed on May 2, 2003. *Id.* at 5-6. He prepared another labor market survey on October 2, 2003. *Id.* at 6.

Cooley testified that in preparing his May 5, 2003 report, he relied on the following documents: Dr. Dale K. John's records, dated May 2, 2001; Dr. Douglas L. Stringer's FCE and notes (May 25, 2000 – March 19, 2002); Florida Department of Corrections' records (December 20, 2001 – May 3, 2002); Labor Market Survey prepared by Sheryl West (November 3, 1999 – November 9, 2002)[5]; a nerve conduction study and electromyographic evaluation performed by

[4] He added that generally guards or dorm officers oversee prisoners' work, and classification officers assign the work crews. *Id.*

[5] Contrary to his testimony, Cooley's report cites Sheryl West's labor market survey performed on November 26, 1999. CX 8 at 3, 4.

Dr. Thomas J. Derbes on October 29, 1998; and a work capacity evaluation performed by Ronald L. Deem, D.O. on September 9, 1999. EX 12 at 6-7; EX 8 at 2. He also reviewed the depositions of Dr. Merle Stringer[6] and Claimant after preparing his May 5, 2003 report. *Id.* at 7.

Cooley testified that the transferable skills analysis contained in his report was developed based on the information regarding Claimant's work history obtained from the report by Sheryl West. EX 12 at 7. He never spoke with Claimant, but indicated that it is possible to prepare a competent labor market survey without speaking to the subject. *Id.* at 7-8. He acknowledged, however, in preparing his report he relied on inaccurate information regarding Claimant's work history and work experience in prison, obtained partly from West's report. *Id.* As a result, after reviewing Claimant's deposition testimony, he realized the need to change the conclusions contained in his report. *Id.* He explained:

> In Ms. West's labor market survey report we had based our analysis on the fact that he worked as a short order cook, fast food worker, a restaurant manager, and also in part based on information that was provided by an Officer Davis at the Ft. Meyers Detention Center, that he had performed while incarcerated.[7] He was performing work described as medium by the Department of Labor. Subsequent information from his deposition indicates that he never was a restaurant manager . . . . That he really had not worked as a fast food worker. And that while incarcerated he had not performed the functions of the DOT, Department of Transportation, work crew that we referenced in our report. The fact that he did not perform that medium work while incarcerated, was also confirmed when . . . on October 27, 2003 I spoke with a Sergeant Eveland or England, I'm not sure how he spells his name, at the center. And he advised me that -- confirmed that Mr. Quinn did not perform the physical duties at the camp as we were led to believe.

EX 12 at 9 (footnote added). Cooley's report lists the following jobs as part of Claimant's employment history (citing Sheryl West's November 26, 1999 labor market survey as a source): tack welder, cashier, manager food service, host,[8] short order cook, carpenter, plumber's apprentice, and deliverer. EX 8 at 3-5.[9] Cooley acknowledged that he never spoke to Ms. West and does not know how she gathered her information. *Id.* at 34. In addition, Cooley's report also states that, as of May 1, 2003, Claimant worked as a highway maintenance worker at the Ft. Myers Work Camp, performing "the full range of medium work" including "extended standing, walking, and frequent reaching, handling, fingering, bending (stooping), and kneeling." *Id.* at 8. Based on this incorrect information, Cooley concluded that Claimant had "minimal, if any,

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[6] He reviewed this document on October 16, 2003. *Id.*

[7] While this statement seems to suggest that the information regarding Claimant's purported work experience at Ft. Myers Work Camp was obtained from West's report, the evidence of records suggests otherwise. As noted below, Cooley's report states that this information was obtained on May 1, 2003 (while West's most recent labor market report is dated October 9, 2002 (EX 10)). EX 8 at 8.

[8] The report notes that this occupation "requires over 1 year up to and including 2 years of specific training to learn the job." *Id.*

[9] The report also notes that no information regarding duration of employment, earnings, and reasons for termination was obtained. *Id*. at 5.

vocational handicaps deriving from any physical limitation or impairment." EX 8 at 13. Cooley also concluded in his report that

> Minimal, if any, wage-loss exposure may occur.
>
> Mr. Quinn is in a Florida Department of Corrections Work Camp, performing the full range of Medium Work. Although there is no significant remuneration, due to incarceration, he is performing substantial vocational activity in an occupation that exists in significant numbers within the open labor market.
>
> In the opinion of this specialist, any and all of Mr. Quinn's wage-loss, from the date of incarceration until his release, is due to incarceration.

Id.

Cooley testified that, based on corrected information, he determined that Claimant would have "less access" to jobs that are dependent on experience in food industry than his previous assessment suggested, although "he still may have access to some entry level occupations associated with the restaurant industry." EX 12 at 9-10. Similarly, he testified that his findings should be restricted to occupations that are light or sedentary as defined by the DOT.[10] *Id.* at 10.

Cooley determined that the following entry level, low-skilled jobs listed in his May 5, 2003 report would be available to Claimant if he was not incarcerated: front desk positions at Beachcombers by the Sea and at Holiday Inn Sun-Spree; a sedentary position as an interview clerk with Bay County Health Department in Panama City; an assembly position with Work Force Innovation in Panama City; and a production worker position at Shwinco Industries in Lynn Haven, Florida. *Id.* at 12. He also added to this list three light to medium duty position: cafeteria worker; housekeeper at St. Andrew's Rehab; and maintenance worker at Early Education & Care, Inc. in Panama City. *Id.* at 11-12. Cooley noted that for these three positions "we would have to more closely screen it to make sure that it was more light than medium." *Id.* Cooley reiterated that "in my labor market we did identify some medium work occupations, because we thought he had performed some medium work, but apparently he did not." *Id.*

Cooley also testified that his assessments took into consideration the fact that Claimant has an IQ of 88, according to the Beta III test score reported by Dr. Herman. EX 12 at 12; EX 8 at 5. He explained that indicates Claimant may learn new skills at a slower than average pace. *Id.* He also considered the fact that Claimant graduated from high school, but did not realize that Claimant took special-education classes until he reviewed his deposition testimony. *Id.* at 12-13. Cooley testified that, although Claimant is of low average intelligence and has minimal transferable skills, having performed jobs that were primarily physical in nature, nothing suggests that he cannot learn new skills. *Id.* at 13, 19.

[10] He explained that in his report "light or sedentary" work is defined as requiring up to 20 pounds of lifting; walking or standing to a significant degree; sitting most of the time combined with pushing and pulling of arm or leg controls; and/or working at a production pace combined with pushing and pulling of material. *Id.*; EX 8 at 9.

Cooley acknowledged that lack of a driver's license would greatly reduce Claimant's access to work. *Id.* at 14. Claimant's history of felony convictions would also have the same effect, while his incarceration renders him presently unemployable. *Id.*

Cooley testified that he believes there are jobs available to Claimant even with his criminal record. *Id.* at 15, 17. He added, however, that even if Claimant had additional surgery, he "can't envision that . . . he's going to go to medium work." *Id.* at 16. Thus, Cooley considered Claimant employable in a "light and sedentary, very nonexertional type occupations." *Id.*

Cooley added that if a Functional Capacity Evaluation ("FCE") could be performed upon Claimant's release, it would facilitate a more accurate assessment of his employability. *Id.* at 17. When Cooley was asked whether Claimant's incarceration precluded him or anyone else from performing an FCE, he replied "I assume – I guess that's true. I was told to do this as a review of records. Again, I am not sure the prison system would let me in there and actually meet him at the facility." *Id.* at 15. He acknowledged that he should have personally verified that. *Id.* at 21. He also testified that he made no attempts to call Claimant. *Id.* He noted that Claimant did have an FCE in May of 2002, which indicated "some maximal effort." *Id.* at 15. With respect to this FCE[11] Cooley's report states:

> [FCE] performed on 05/24/00 and 5/25/00, reported Mr. Quinn did not give maximum consistent effort during testing, was self limiting, and exhibited "pain behavior that was neither consistent with the amount of pain described, clinically observed, nor consistent on a physiological or anatomical basis." The behaviors demonstrated at the FCE suggest that assessment of Mr. Quinn's residual functional capacity, based upon his subjective complaints, may underestimate his true residual functional capacity.

EX 8 at 7.

On cross-examination, Cooley testified that he was retained by Carol Aaron, with whom he had worked in the past. EX 12 at 19. He testified that he lives in St. Petersburg, Florida, and it takes him one hour and ten minutes to get to the Panhandle area of Florida in his personal airplane. *Id.* at 20. He acknowledged that he is more familiar with the Hillsborough/Pinellas County area than with the Panhandle area, but added that, due to his airplane, it is not unreasonable for him to work in the entire state of Florida. *Id.*

Cooley stated that he was unaware that Claimant's compensation was reduced on March 1, 2003, *i.e.*, prior to his May 5, 2003 report. *Id.* He acknowledged that his first labor market survey (which covered the Panhandle area) was done in May of 2003, and none were done in March. *Id.* Cooley further testified that he did not know what Claimant's impairment rating

[11] Among the documents reviewed by Cooley, his report lists only one work capacity evaluation which was performed by Ronald L. Deem, D.O. on September 9, 1999. Ex 12 at 6-7; EX 8 at 2. Thus, the source of information concerning the May 2000 FCE is unclear.

was, because it plays no role in vocational evaluation. *Id.* at 23. Instead, what matters is "the impairment and its functional limitations." *Id.*

Cooley provided testimony regarding each of the ten jobs listed in his May 2, 2003 labor market survey, confirming some positions as appropriate and eliminating others because they were based on inaccurate information about Claimant's professional experience and physical abilities. He testified that the front desk job at "Tops' 1" in Destin, Florida, which involves customer service, guest relations, cash handling, and reservations (with 80% standing and "experience desired") is appropriate because Claimant has a cash handling ability as evidenced by his convictions for the sale of drugs. EX 8. at 24-25. Cooley stated he did not know what kind of establishment "Tops' 1" was. *Id.* He also confirmed two similar front desk positions (at Beachcombers by the Sea and Holiday Inn Sun-Spree in Panama City), which require some computer knowledge or cash handling background. *Id.* at 26. He also confirmed a host job at a restaurant (Shuckers) in Panama City, which involved greeting and seating guests, setting tables, changing linens, and general cleaning, and which noted that restaurant experience was "preferred." *Id.* at 27. Cooley testified that Claimant could "sell . . . as past experience" the fact that his family owned a restaurant. *Id.* He acknowledged that the listed tasks would involve bending. *Id.* He also acknowledged that several medium duty jobs should be deleted from the list of jobs included in the May 2, 2003 survey. *Id.* at 25-26. With respect to several light/medium duty positions, he stated that he would have to make sure that the medium level work could be avoided, but has not done so. *Id.*

Cooley next testified regarding his October 2, 2003 labor market survey, which identifies a total of six jobs. EX 12 at 28; EX 11. The survey lists an interview clerk position at Bay County Health Department, which is sedentary and requires knowledge of Windows-based computer programs, light data entry skills, and customer service experience. EX 11 at 1. After reviewing Claimant's deposition, Cooley concluded that he does not have the required experience. *Id.* at 28. Cooley also testified that a light/medium duty position as a maintenance worker at Early Education & Care, Inc., which involves lifting up to 50 pounds, should be eliminated. EX 11 at 1. He further acknowledged that an assistant manager position at a convenience store which requires six months' experience in a similar position must also be eliminated for lack of experience. *Id.* He added, however, that because this job does not require a high school degree, Claimant "would be a candidate assuming he didn't have to work in the medium level" (since this is a light/medium job with a 40 pound lifting requirement). EX 12 at 29, EX 11 at 2. Cooley indicated that he did not exclude jobs from his survey based on Claimant's prior felony convictions. *Id.* at 29. Cooley acknowledged that a baker's assistant job would be inappropriate for Claimant given the light/medium work, a 50 pound lifting requirement, and the fact that "transferring racks to and from [the] oven" would require bending. EX 11 at 2; EX 12 at 30. The survey further lists an assembly position with the Agency for Workforce Innovation in Panama City, which is classified as sedentary despite a requirement for walking up to 50 percent of each shift. EX 11 at 3. Cooley noted that this job is probably light duty (rather than sedentary) since it requires standing 80 percent of the time. EX 12 at 30. The job involves production assembly of small parts, requires repetitive arm and hand movements, good vision, and finger dexterity, and training is provided. EX 11 at 3. The survey also lists a production worker position at Shwinco Industries in Lynn Haven, Florida, classified as light duty, which involves assembling aluminum windows, measuring, cutting aluminum, and

utilizing small hand tools. EX 11 at 3. Cooley initially testified that there was no indication that bending would be required, but later added that he is familiar with window production and believes that this bench assembly would involve some bending. *Id.* This job description also states that a candidate must be able to read a measuring tape to a 16th of an inch and convert measurements to decimals. EX 11 at 3. Cooley stated that he is not certain whether Claimant can do this, but he believed that Claimant "is familiar with weights and measures as his history in selling cocaine" indicates. *Id.* Cooley indicated that all the employers listed in his October survey were hiring in October, but he was not sure if they had been hiring in March of 2003. EX 12 at 30.

Cooley testified that he determined, based on the most recent amendments to his labor market survey, the dollar amount that Claimant would likely earn if he was released from prison. *Id.* Initially, in his May 5, 2003 report, he had listed 48 occupations (17 of them were medium, 28 were light, and 3 were sedentary) and concluded that they pay from $280 to $440 per week. EX 8 at 12. He testified, however, that "that's going to be less because some of the higher paying jobs were in the medium work occupations which we are going to eliminate. So, I'm thinking based on the information that I see he will make from 220 to probably 320 a week. That's entry level, low skilled type work." EX 12 at 34.

Carol Aaron

Carol Aaron testified by deposition on September 29, 2003. EX 4. She works for North American Risk Services and has been the adjuster in Claimant's case since November 2002.[12] *Id.* at 4. She was aware of Claimant's incarceration. *Id.* at 5. She ordered a labor market survey from Steven Cooley and knew about Sheryl West's labor market surveys. *Id.* at 6-7.

After reviewing the file on the day of her deposition, Aaron realized that she never reduced Claimant's benefits based on the wage earning capacity specified in Cooley's report. *Id.* at 7. At the time of the deposition, Claimant was paid $42.12 per week, while he had previously been paid $73.32. *Id.* She testified that the $42.12 rate was based on Claimant's average weekly wage of $369.18 and on Cooley's labor market survey, which suggested a potential weekly wage of $306.00 per week. *Id.* She explained that she obtained the figure $306.00 by calculating an average salary paid by nine of the ten jobs listed in Cooley's survey.[13] *Id.* at 7-8.

Aaron was asked to locate in Claimant's file a letter from Claimant's attorney to Mr. Hastings, dated March 26, 2002, requesting authorization for medical care at a correctional facility, since Dr. Stringer was unavailable to Claimant (as well as follow up letters dated April 22, 2002 and June 26, 2002 urging a response to this correspondence). *Id.* at 10. She was unable to locate these documents. *Id.* She testified that she had no record of any authorization to use medical providers other than Dr. Stringer issued on or after March 26, 2002. *Id.* She testified that when incarcerated claimants request medical care, "you have to get permission from the prison and usually guards will accommodate them and take them to the appointments." *Id.*

[12] According to Aaron, Claimant's previous adjuster was David Hastings of F.A. Richard and Assoc. *Id.* at 5. Later his file was transferred to Aaron. *Id.*

[13] She excluded the cabinet installer job because she considered it to be outside Claimant's limitations. *Id.*

She testified that Claimant's compensation rate was supposed to be reduced to $97.05 effective December 29, 1999.[14] *Id.* at 14. It was also supposed to be reduced to $73.32 effective January 16, 2001, based on West's labor market survey that showed five or six available jobs with a wage earning capacity of $259.20.[15] *Id.* at 14-15. The reduction to $73.32 went into effect on January 17, 2001; however, effective July 4, 2001, the full rate of $246.12[16] was restored and Claimant was paid a lump sum in compensation for this temporary reduction in benefits.[17] *Id.* at 15-16. Thus, in effect, no actual reduction was made until March 1, 2003 and a full rate of $246.12 continued to be paid until this date. *Id.* at 15-16. On March 1, 2003, compensation payments were reduced to $73.32. *Id.* at 16. Aaron explained that since this reduction was supposed to become effective January 16, 2001, but actually went into effect March 1, 2003, Claimant received an overpayment. *Id.* at 17. She testified that she did not assess an overpayment and did not issue any notice to that effect. *Id.* She added, however, that she "absolutely" plans to assess an overpayment during "settlement negotiations," if there was in fact an overpayment. *Id.* She explained that she never made a decision with respect to overpayment because "today was the first day that I noticed that I hadn't taken a reduction from my labor market survey, so that's 30 something a week, give or take." *Id.* at 18.

The record contains the following additional testimony and non-medical evidence:

- Labor Market Survey Report prepared by Sheryl West, dated November 6, 2000. EX 9. This report incorporates by reference West's labor market survey report dated November 26, 1999 with respect to Claimant's background data, pre-injury work history, education and training profile. As stated above, this information was later found to be largely inaccurate. EX 12 at 7-9. In this survey, West identified the following six jobs as being available to Claimant: assistant manager trainee (light duty, involves occasional bending, stooping and kneeling); two cashier/sales clerk positions (same physical demands as the previous job); PM cook (light duty/involves occasional bending, kneeling); cashier in Panama City (same physical demands as the previous job); auto dealer (must be willing to learn; light duty; walking; occasional bending, kneeling, and climbing). EX 9.

  Attached to this survey is a letter dated December 17, 1999 from David Hastings, then Carrier's adjuster, stating that because West's survey showed an earning capacity of $223.60 per week, Claimant's compensation rate was being reduced to $97.05 per week effective December 29, 1999. EX 9.

- Labor Market Survey Report prepared by Sheryl West, dated October 9, 2002. EX 10. Like her previous reports dated November 26, 1999 and November 6, 2000, this report was also based on inaccurate information regarding Claimant's employment history, as it states that Claimant has experience as a cashier, host,

[14] The evidence shows that this intended reduction was based on West's 11/11/99 survey. EX 9 (letter dated 12/17/99 attached to West's survey).
[15] It appears that Aaron was referring to the same 11/6/00 survey by West, which she cited as a basis for the previous reduction.
[16] This rate is based on Claimant's average weekly wage of $369.18. *Id.*
[17] Aaron testified that $5,034.50 was written out to Claimant's counsel and $2,764.80 was written out to Claimant. *Id.* at 16.

restaurant manager, and short order cook. EX 10 at 4. In this survey, West identified eight positions as being available to Claimant: counter clerk at Superior Dry Cleaning in Panama City (light duty – will alternate standing with walking and reaching), as well as seven cook and/or waiter positions in Panama City (same physical demands as above). EX 10.

- Photographs of post-operative scar along Claimant's lower back and of Claimant wearing a back brace. CX 1.

- Affidavit of Ronald S. Webster, Esq. dated October 14, 2003 with attached correspondence to Carrier requesting medical care. CX 16.

- "Inmate Population Information Detail" from Florida Department of Corrections identifying Claimant and listing, *inter alia*, sentence and incarceration history. CX 18.

- Undated disability evaluation report of Phoenix Rehabilitation Corporation signed by Leslie A. Gillespie. CX 19.

- Curriculum vitae of Leslie A. Gillespie. CX 20.

- Video tape of Claimant's deposition. CX 22.

- Correctional facility records from Florida Department of Corrections, including Claimant's arrest and conviction record and prison sentence history. EX 3.

- Medical and Indemnity payout ledger. EX 5.

- Payment of Compensation without Award (Form LS-206), dated September 29, 2003. EX 6.

- Notice of Controversion of Right of Compensation, Form-207, dated September 29, 2003. EX 7.

- Payment of Compensation without Award (Form LS-206), dated August 11, 1998 (EX 13), October 14, 1998 (EX 14), February 1, 2000 (EX 16), and June 14, 2001 (EX 17).

Medical Evidence

Merle P. Stringer, MD

Dr. Merle P. Stringer testified by deposition on August 25, 2003. CX 3. He is licensed to practice medicine in Florida, has been board certified in neurologic surgery since 1982, and his practice is limited to neurology. *Id.* at 4.

Dr. Stringer testified that Claimant was last examined on October 23, 2001 by his brother, Douglas Stringer, who is also a board certified neurosurgeon. CX 3 at 4. He and his brother share a practice. *Id.* at 5. On February 19, 2002, Douglas met with Claimant's rehab counselor, Alice Sundra,[18] as Claimant failed to show up for an appointment that day. *Id.* at 5-6. Merle Stringer last examined Claimant on September 11, 2001. *Id.* at 5. He testified that both he and his brother treated Claimant, and thus Claimant's file contains notes prepared by both doctors. *Id.*

During the most recent examination, Merle Stringer's impressions were: (1) recurring back pain with no evidence of lumbar nerve root compression or cauda equine compression; and (2) status post decompression laminectomy diskectomy at L4-L5; posterolateral fusion at L4-S1; and pedicle screw fixation at L4-L5 with placement of bone fusion stimulator on June 5, 2001. CX 3 at 6-7; CX 2 at 6. He also found that Claimant had a moderately limited range of motion with back flexion and extension. *Id.* at 32.

Douglas Stringer recorded the following impressions after examining Claimant on October 23, 2001: (1) lumbar disc disease, low back pain, post-op decompression laminectomy at L4-L5, posterolateral fusion at L4 to S1, pedicle screw fixation at L4-L5 with placement of bone fusion stimulator June 5, 2001, improving; and (2) myofascitis of the lumbar spine with trigger point tenderness and facet inflammation. *Id.* at 8; CX 2 at 4.

Merle Stringer testified that he and his brother performed Claimant's first surgery on March 1, 1999, which consisted of: (1) L4-L5/L5-S1 bilateral lumbar laminotomy, foraminotomy exploration and nerve root decompression; and (2) diskectomy at L4-L5/L5-S1 bilaterally. CX 3 at 8-9; CX 2 at 45. On August 26, 1999, Douglas Stringer determined that Claimant had reached MMI with a whole body impairment rating of 14 percent based on the Florida Impairment Rating Guide. *Id.* a t 10-13; CX 2 at 34.

Dr. Stringer further testified that after his first surgery, Claimant again developed pain in his low back and both legs. CX 3 at 10. After physical therapy, facet injections, trigger point injections, and other non-invasive treatments failed, a second surgery was performed on June 5, 2001 in order to alleviate Claimant's pain. *Id.* at 10-11. This surgery consisted of: (1) a bone graft from the right post iliac crest; (2) an L4-L5 decompression laminectomy, foraminotomy exploration; (3) a diskectomy at L4-L5 bilaterally using microsurgical technique at L5-S1 as well; and (4) a posterolateral fusion at L4-L5 with pedicle screw fixation using graft bone and single cables with placement of a bone fusion stimulator. *Id.* at 11.

Claimant was subsequently seen on August 19, 2001 and showed improvements in his back and leg pain, although he still had some pain in his back around the incision. CX 3 at 11.

On July 18, 2001, Claimant had very little pain in his back, no numbness, no weakness, and no problem with bowel or bladder control. CX 3 at 11.

[18] *See* CX 3 at 53.

On February 19, 2002, Douglas Stringer determined that Claimant had reached MMI with respect to his second surgery, and assigned him a whole body impairment rating of 19 percent[19] in addition to the previous rating of 14 percent, for a total of 33 percent.[20] CX 3 at 13, 15; CX 2 at 53.[21] Merle Stringer testified that this rating was also based on the Florida Impairment Guides. *Id.* at 15. He reiterated that, to his knowledge, no evaluation of Claimant's impairment was done under the AMA Guides. *Id.* at 15.

Dr. Stringer explained that since Claimant failed to show up for his appointment on February 19, 2002, his brother Douglas apparently assigned him the 19 percent rating on that day based on his last examination of Claimant on October 23, 2001. CX 3 at 16. Dr. Stringer testified that the impairment ratings did not take into account pain and discomfort, but only the procedures listed above. *Id.* at 17.

Dr. Stringer further testified that Claimant was referred for an FCE after the fist surgery. CX 3 at 18. It was performed on September 9, 1999 and the FCE report submitted to his office stated that Claimant was able to work "in the sedentary type PDL category." *Id*.; CX 2 at 32. He testified that Claimant was released to work with these restrictions on the same day. *Id.*[22]

According to Dr. Stringer, no FCE was performed after the second surgery. CX 3 at 18, 19. He further testified that following the second surgery Claimant had not been released to work in any capacity. *Id.* He added that the question of restrictions was not addressed on February 19, 2002,[23] because Claimant was still wearing a brace when he was last seen on October 23, 2001 and restrictions are usually addressed when the brace is removed six months after an operation involving instrumentation and fusion. *Id.* at 19. What happens when a brace is removed depends on how a patient is doing, but "[m]ore likely than not we'll start some physical therapy and some work hardening because they've been in a brace for so long. We do some muscle strengthening." *Id.* at 20. Dr. Stringer testified that he did not know whether Claimant had had any such therapy or other treatments since October 23, 2001. *Id.* at 20, 22-23.

Dr. Stringer testified that he would be able to provide an opinion regarding Claimant's current condition and work restrictions only if he could examine him. CX 3 at 20. Otherwise, he

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[19] Dr. Stringer specified that 10 percent was assigned for the lumbar laminectomy and 9 percent for instrumentation and fusion. *Id.* at 13.

[20] Dr. Stringer explained that the ratings for the two back surgeries were added together because the second surgery was a "more extensive operation using instrumentation and fusion, pedicle screw fixation. The fist time around he had a bilateral two level lumbar laminectomy. They're a lot different." *Id.* at 14.

[21] He also stated that Claimant "would also need to have a bone stimulator removed, since it has been over six months, he no longer needs it." *Id.*

[22] Specifically, the note dated September 9, 1999 states, *inter alia*:

> He has a significant amount of back pain when he is up, relieved somewhat, but not entirely by bed rest. I have recommended we place him in a molded back brace. . . . . If a job can be found for him within the restrictions as listed in the FCA, I feel he should pursue this on a trial basis.

CX 2 at 23.

[23] As noted below, Dr. Stringer's testimony that, following his second surgery, Claimant was not released to work and work restrictions had not been addressed on February 19, 2002 is contradicted by Douglas Stringer's communications to Claimant's rehab counselor, Alice Sundra, bearing the same date. CX 3 at 53, 54-55.

could only provide an opinion based on his last examination of October 23, 2001. *Id.* at 21. He testified that he had no communication with physicians that treated Claimant since that time. *Id*.[24]

Dr. Stringer further testified that the only surgery that was planned for Claimant was the removal of the stimulator. *Id.* at 22. He added that Claimant's rehab counselor was told on February 19, 2002 that it had to be removed, but he was unaware of whether or not this was done. *Id.* at 22.

On cross-examination, Dr. Stringer testified that, based on his recollection, the ratings specified in the Florida Impairment Guides and the AMA Guides differ in that one of them "was a little bit higher, not a lot, you know, two or three percent maybe, but I can't remember which one it was." *Id.* at 24.

With respect to Claimant's prognosis, Dr. Stringer testified:

> [M]ore likely then not, you know, he'll have some long term limitations with regard to his back. We limit their lifting on an ongoing basis when they have this kind of surgery. We would be reluctant to have them lift over 50 pounds for sure. We would want to restrict his bending, stooping, and that sort of thing. The vast majority of people are able to go back to work, but they would have some restrictions.

Id.

Dr. Stringer acknowledged that Douglas Stringer filled out a form,[25] dated February 19, 2002,[26] in which he indicated that Claimant's projected MMI was February 19, 2002 and that (in contradiction to his earlier testimony (CX 3 at 18-20)) he was released for light duty work with the permanent restrictions of "no lifting over 20 pounds, no climbing or bending." CX 3 at 25-26, CX 2 at 54.

Dr. Stringer testified that about 30 percent of the patients who have fusion develop degenerative changes in the discs above and below the area of the fusion. CX 3 at 28. He added that Claimant's excessive weight could negatively affect his symptoms and prognosis because it put excessive stress and strain on the back, knees, and ankles. *Id.*

Dr. Stringer testified that Claimant underwent multiple injections, such as facet injections and trigger point injections. *Id.* at 29. He indicated that on October 23, 2001, Claimant was referred for an x-ray, but he did not know if it was ever done. *Id.* Dr. Stringer added that, according to an MRI scan done May 4, 2000, Claimant had a Grade I spondylolisthesis (or

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[24]The only communication was a telephone inquiry by a prison employee as to whether one of the neurosurgeons available to prisoners could remove Claimant's bone fusion stimulator, to which Dr. Stringer replied affirmatively. *Id.*

[25] As the language of this form suggests, Douglas Stringer apparently filled it out at the request of F.A. Richard & Associates, Inc. *Id.*

[26] For unexplained reasons, a date of February 19, 2001 is handwritten on the front of the form, although the signature line on the second page reflects a date of February 19, 2002. *Id.*

subluxation) at L4-L5, which did not change from January 17, 2000. *Id.* at 30. He explained that the goal was to stabilize subluxation, rather than correct it, and he would not expect it to increase. *Id.* at 29-30. He further testified that he does not know whether Claimant's disc spaces narrowed at the L3-L4, L4-L5, and L5-S1 levels. *Id.* He acknowledged, however, that depending on the degree of such narrowing, it "can narrow the neural foramina which could cause problems with the exiting nerve roots." *Id.*

When asked what kind of treatment he would recommend for Claimant if he was not incarcerated, Dr. Stringer testified that the only treatment would be a back exercise program (e.g., Williams Back Exercises twice a day) and limiting his lifting to "not over, anywhere between 20 and 50 pounds, depending on how he is doing." CX 3 at 30-31. He would also be encouraged to lose weight and stop smoking. *Id.*

Dr. Stringer stated that when his brother Douglas indicated in a note dated October 23, 2001 that Claimant had myofascitis of the lumbar spine with trigger point tenderness, he was referring to the fact that Claimant had tenderness along the paravertebral muscles and areas of localized tenderness that cause radiating pain when pressed. CX 3 at 31; CX 2 at 4.

On redirect examination, Dr. Stringer acknowledged that any of his opinions regarding Claimant's condition subsequent to his last examination are speculative. *Id.* at 33-34.

The record contains the following additional medical evidence:

- Medical records of Dr. Douglas Stringer and Dr. Merle Stringer for the period May 1999 through February 2002. CX 2.

- Medical records from Florida Department of Corrections. CX 4.

- Medical records from Gulf Pines Hospital dated June 21, 1998 and February 13, 2001. CX 5.

- Medical records from Therapy 1 Rehabilitation Center dated August 1998. CX 6.

- Report of examination by Dr. Gregg A. Alexander dated January 18, 1999. CX 7.

- Report of a nerve conduction study conducted by Dr. Thomas J. Derbes on October 29, 1998. CX 8.

- Treatment records from Gulf Pines Physical Therapy office dated September 1998 through March 2000. CX 9.

- Medical records dated 1998 through 1999 of Dr. James M. Talkington, Florida Sportsmedicine and Orthopaedic Center, Panama City, Florida. CX 10.

- Report of evaluation dated May 2, 2001 by Dr. Dale K. Johns. CX 11.

- Treatment records dated August 11, 1998 from Panama City Orthopedics. CX 12.

- Records dated August 19, 1998 from West Florida Home Health Care, Inc. regarding cane, lumbar support, and lumbar pillow. CX 13.

- Medical records from Bay Medical Center dated August 1998 through June 2001. CX 14.

- Radiology report dated July 17, 2001. CX 15.

- Florida Department of Corrections Health Slip/Pass signed by Dr. Lang, dated February 7, 2003. CX 17.

IV. DISCUSSION

Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain whether the claimant has reached maximum medical improvement ("MMI"). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Ins. Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989).[27] The determination of when MMI is reached, *i.e.*, when the claimant's condition becomes permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985).

The Act does not supply standards for distinguishing between the different degrees of disability. Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, in order to establish *a prima facie* case of total disability, a claimant must show that he cannot return to his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F. 2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Dir., OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). The same standard applies whether the claim is for temporary or permanent total disability. He need not

[27] A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Serv. Eng'g Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metro. Area Transit Auth.*, 13 BRBS 446, 447 (1981).

establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). A finding of disability may be established based on a claimant's credible subjective testimony. *See, e.g., Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain).

(1) Claimant's *prima facie* showing of total disability.

Where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998), *Caudill v. Sea Tac Alaska Shipbuilding*, 953 F.2d 552 (1992), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Dir., OWCP*, 8 F.3d 29 (9th Cir. 1993). Employer does not dispute, and the evidence of record confirms, that Claimant is physically incapable of returning to his pre-injury job as a welder in ship construction. Dr. Douglas Stringer determined that Claimant reached MMI following his first surgery on August 26, 1999 and released him to work on September 9, 1999 "in the sedentary type PDL category," based on the results of an FCE performed on the same day. CX 3 at 18; CX 2 at 32. Following Claimant's second surgery, Dr. Stringer determined that Claimant reached MMI on February 19, 2002 and released him for light-duty work with permanent restrictions of "no lifting over 20 pounds, no climbing or bending."[28] CX 2 at 54; CX 3 at 25-26. Claimant's vocational expert, Leslie Ann Gillespie, testified that these restrictions correspond to a restricted range of light-duty work.[29] Similarly, Employer's vocational expert, Steven Cooley, testified that Claimant would be employable only in a "light and sedentary, very nonexertional type occupation" with these restrictions. Tr. 60. Claimant described his welding job with Employer as "heavy-duty work" and testified that he was "dealing with a lot of weight and steel." CX 21 at 9. Employer never disputed this testimony. Claimant's vocational expert concluded that Claimant's physical restrictions would preclude him from returning to his prior work as a welder, and Employer's two vocational experts never contradicted this expert opinion. Tr. 62-63; EX 8; EX 11; EX 9 and 10. Based on the foregoing, I find that Claimant has satisfied his initial burden of proving total disability.[30]

[28] In its "Summary of the Argument," Employer asserts that it "has been prejudiced by its inability to evaluate claimant's ongoing condition through functional capacity evaluations, independent medical examinations and updated reports from authorized treating providers." Emp. Br. at 15. This argument, however, is spurious and unsupported by the record. There is no evidence in the record that Employer ever sought to have Claimant evaluated during his incarceration and was denied this opportunity. Employer's vocational expert testified that he was specifically asked to perform a vocational evaluation based on "a review of records" (i.e., without contacting Claimant in person). *Id.* at 15, 21. In fact, he never even attempted to contact Claimant by telephone. *Id.* Furthermore, Employer's claims adjuster, Carol Aaron, testified that the prison system allows incarcerated claimants to see physician upon request ("guards will accommodate them and take them to the appointments.") EX 4 at 10.

[29] Gillespie testified that Claimant would not be able to perform the full range of light duty work, since his limitations of no climbing or bending preclude certain jobs in the light and sedentary range of work, as they are defined by the DOT. Tr. 60.

[30] Employer's assertion that the medical evidence does not support a finding of total disability because it shows that Claimant's medical disability is only partial has no basis in law. Emp. Br. at 14. As stated above, to make a *prima facie* showing of total disability Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984). In fact, even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89, 92 n.4 (1984). It is irrelevant that a physician terms such an impairment "partial." *Employers Liab. Assurance Corp. v. Hughes*, 188 F. Supp. 623 (S.D.N.Y. 1959).

(2) Suitable alternate employment.

Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternate employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To do so, the employer must show the availability of realistic job opportunities within the geographical area where the claimant resides, which he is capable of performing, considering his age, background, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1031. If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See*, *e.g.*, *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544 (9th Cir. 1991) *rev'g* 24 BRBS 213 (CRT); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant may rebut the employer's showing of suitable alternate employment and retain eligibility for total disability benefits if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. A failure to prove suitable alternate employment results in a finding of total disability. *McDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd*, (No. 86-3444)(11th Cir. 1987)(Unpublished).

Employer argues that it has met its burden of proof by demonstrating through labor market surveys and testimony of vocational rehabilitation experts that "numerous job opportunities exist for the claimant despite his current physical and skill limitations." Emp. Br. at 18. Employer further asserts that Claimant has been "unemployable by virtue of his continued incarceration." Emp. Br. at 16. However, Claimant's incarceration does not relieve Employer from its burden of proving suitable alternate employment, as the Board has held that a claimant's incarceration does not preclude an award of total disability if there was no suitable alternate employment available during the period of incarceration. *Sam v. Lofeland Bros. Co.*, 19 BRBS 228 (1987); *Allen v. Metropolitan Stevedore*, 8 BRBS 367 (1978). For the reasons stated below, I find that Employer has failed to prove the availability of suitable alternate employment.

Employer submitted into evidence four labor market survey reports: November 6, 2000 and October 9, 2002 reports prepared by Sheryl West,[31] as well as the more recent reports, dated May 2, 2003 and October 2, 2003, prepared by Steven Cooley. Cooley testified that his and West's reports were based largely on inaccurate information regarding Claimant's work history and functional capacity, *i.e.*, that Claimant had prior experience as a short order cook, host, fast food worker, and restaurant manager and he had performed a full range of medium-duty work during his incarceration.[32] EX 12 at 9; EX 8 at 3-5, 8;[33] EX 10 at 4.[34]

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[31] West's November 26, 1999 report was not offered into evidence. EX 9 and 10.

[32] As noted above, Cooley acknowledged that

> In Ms. West's labor market survey report we had based our analysis on the fact that he worked as a short order cook, fast food worker, a restaurant manager, and also in part based on information that was provided by an Officer Davis at the Ft. Meyers Detention Center, that he had performed while incarcerated. He was performing work described as medium by the Department of Labor. Subsequent information from his deposition indicates that he never was a restaurant manager . . . . That he really had not worked as a fast food worker. And that while incarcerated he had not performed the functions of the DOT, Department of Transportation, work crew that we referenced in our report. The fact that he did not perform that medium work while incarcerated, was also confirmed when . . . on October 27, 2003 I spoke with a Sergeant Eveland or England (sic), I'm

For several reasons, I find that the jobs identified in West's November 6, 2000[35] and October 9, 2002 reports do not constitute available suitable employment for Claimant. First, as noted above, West erroneously believed that Claimant had worked previously as a short order cook, fast food worker, and restaurant manager, and that he was capable of performing up to medium-level work. *See, e.g.,* EX 12 at 8-9. However, the credible evidence of record shows that he has never held any of these jobs and that he is capable, at most, of performing a limited range of light duty. West's incorrect understanding of Claimant's experience and physical capabilities undoubtedly influenced her identification of available jobs, and that fact alone is sufficient to undermine the value of her labor market surveys. However, even ignoring West's misunderstanding concerning Claimant's experience and functional capacity, the jobs identified in her reports are clearly not suitable for Claimant.

In her November 6, 2000 report, West identified six light-duty jobs which she believed were then available to Claimant. This report was prepared after Claimant's March 1, 1999 surgery and before his second surgery on June 5, 2001. On September 9, 1999, only two months before West's labor market survey, an FCE established that Claimant was capable of performing work "in the sedentary type PDL category" and he was released to work on that date with those restrictions. CX 3 at 18; CX 2 at 32. Since restrictions consistent with sedentary employment were in effect at the time of the labor market survey, each of the six light-duty jobs identified by West were beyond Claimant's physical capabilities, and they were thus not reasonably available to Claimant.

Even if Claimant could physically perform the six jobs identified in the November 6, 2000 labor market survey, they are unsuitable for Claimant for other reasons. The first job identified by West is an "assistant manager trainee" position which appears to have been included based on her mistaken belief that Claimant had prior experience as a restaurant manager. As noted above, Claimant has no prior managerial experience. Indeed, his pre-injury

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> not sure how he spells his name, at the center. And he advised me that -- confirmed that Mr. Quinn did not perform the physical duties at the camp as we were led to believe.

Id. at 9. In fact, West's October 9, 2002 report incorrectly states that Claimant had experience as a cashier, host, restaurant manager, and short order cook. EX 10 at 4.

[33] Cooley's report lists the following jobs as part of Claimant's employment history, citing Sheryl West's 11/26/99 labor market survey as a source: tack welder, cashier, manager food service, host, short order cook, carpenter, plumber's apprentice, and deliverer. EX 8 at 3-5. Cooley's report also states that as of May 1, 2003, Claimant worked as a highway maintenance worker at the Ft. Myers Work Camp, performing "the full range of medium work" including "extended standing, walking, and frequent reaching, handling, fingering, bending (stooping), and kneeling." *Id.* at 8. Based on this incorrect information, Cooley concluded in his report that because such "demonstrated behavior takes precedence," Claimant has "minimal, if any, vocational handicaps deriving from any physical limitation or impairment." EX 8 at 8,13.

[34] Cooley also acknowledged that he never personally talked to Claimant. EX 12 at 15. Under the current case law, an administrative law judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985). Thus, although Cooley had a chance to qualify his findings during the hearing based on corrected background information, the credibility of his reports is diminished.

[35] As stated below, the jobs listed in this survey are unsuitable under the prior sedentary restrictions as well as under those imposed by Dr. Douglas Stringer on February 19, 2002.

jobs consisted entirely of manual labor positions in which he was categorized as a "helper" rather than a "lead" worker. Tr. 61. Claimant's low average intellectual functioning also suggests that he may not be a suitable candidate for a management position. EX 12 at 12. Similarly, the other positions identified by West as a cashier and cashier/sales clerk are also not realistically available to Claimant. According to Leslie Ann Gillespie, Claimant's vocational expert, his pre-injury felony convictions alone would preclude any employment that would give Claimant free access to money or credit card information. Tr. 65. While Employer improvidently relies on the Board's decision in *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986) for the proposition that Claimant's pre-injury felony convictions may not be considered in determining whether jobs are realistically available to Claimant (Emp. Br. at 16, 19), that decision was reversed by the Ninth Circuit Court of Appeals, and it has been repudiated by the Board itself in subsequent cases. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), *rev'g* 19 BRBS 6 (1986); *Piunti v. ITO Corp.*, 23 BRBS 367 (1990). Claimant's prior record may thus be considered with respect to whether suitable alternate employment exists.

With respect to West's October 9, 2002 labor market survey, she lists eight jobs as being available to Claimant. EX 10. All but one of the positions identified by West are located in Panama City, Florida approximately 36 miles from Claimant's residence in Port St. Joe. Tr. 34.

In order to satisfy its burden of proof, Employer must identify job opportunities located in a geographic area that is realistically accessible to Claimant. *See, e.g.*, *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). In the present case, Claimant is unable to use personal transportation to commute to work, since his driver's license has been suspended due to a DUI conviction. CX 21 at 30. Claimant's license suspension occurred before he was injured. It thus constitutes a "prior impediment" to his ability to obtain certain jobs and must be considered in determining if suggested jobs are realistically available. *Cf. Livingston,* 32 BRBS at 123 (driving positions were suitable for claimant since DUI convictions and license suspension occurred *after* injury and before employer performed the job search). *Id.* Employer never disputed Bertha Quinn's testimony that there is no public transportation between Port St. Joe and Panama City. Tr. 34. Indeed, Claimant himself testified that he had to leave a plumbing job in Panama City due to his inability to commute. CX 21 at 35. Without the ability to get to and from work, none of the jobs identified by West in Panama City are realistically available to Claimant.[36]

[36] West identified one cooking job in Mexico Beach, Florida, which is about 11 miles from Port St. Joe. Even if that job were found to be reasonably accessible to Claimant, this single job opportunity would not satisfy Employer's burden of proof since none of the other jobs suggested by Employer are reasonable available to Claimant. The Board and the courts have held that a showing by an employer of a single job opening is not sufficient to satisfy the employer's burden. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *Green v. Suderman Stevedores*, 23 BRBS 322 (1990). Rather, an employer must present evidence that a range of jobs exists which is reasonably available and which the disabled claimant is realistically able to secure and perform. *Id.* The Board has also stated that if the employer identifies only one actual position that is both suitable for and realistically available to the claimant, it can meet its burden by demonstrating the general availability of similar positions in the claimant's community during the questionable period. *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). However, Employer failed to make such a showing in the present case.

Furthermore, for the reasons noted above, none of the jobs in the October 2002 report which allow access to money, *e.g.*, "counter clerk" and "waiter," are realistically available to Claimant given his prior felony convictions. Tr. 65. Similarly, the positions of "cook," "fry cook," and "short order cook" listed in the survey are based on West's mistaken belief that Claimant had prior experience as a cook, and there is nothing in her labor market survey to indicate whether these jobs require experience. CX 21 at 9; Tr. 23; CX 12 at 9.[37] For all these reasons, the jobs identified by West are not reasonably available to Claimant.

Employer has also failed to establish that any of the ten jobs identified by Steven Cooley in his May 2, 2003 labor market survey are suitable for Claimant. For example, Cooley acknowledged that the three medium duty jobs he identified should be excluded since they are clearly incompatible with Claimant's physical limitations and were incorporated based on his mistaken belief that Claimant had performed medium-duty work in prison. EX 12 at 11-12, 25-26. Similarly, with respect to two positions listed as "light/medium" duty, Cooley testified that he would have to ensure that the medium level work associated with each position could be avoided. He acknowledged, however, that he had not yet done so. *Id*.[38] The Board has previously stated that, when a vocational expert is uncertain of whether the positions he identified are compatible with a claimant's physical and mental capacities, the expert's opinion cannot meet the employer's burden of proof. *See Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196, 199-200 (1984). These jobs are thus not shown to be realistically available to Claimant.

For the reasons previously stated, I also find that the "front desk" job identified by Cooley at "Tops' 1" in Destin, Florida is inappropriate because it requires "cash handling." EX 8; EX 12 at 24-25.[39] In addition, this job involves customer service, guest relations, and reservations (with 80% standing and "experience desired"), and was apparently included by Cooley based on his mistaken belief that Claimant previously worked as a "host." Claimant has no such past experience. Furthermore, Employer has failed to show that Destin, Florida, located approximately 92 miles from Port St. Joe, is reasonably accessible to Claimant. *Kilsby,* 6 BRBS at 114 (job located 65 miles away did not satisfy employer's burden because it was not within claimant's "local community").

Cooley's survey further lists two additional "front desk" positions,[40] which I find are unsuitable for Claimant because they require computer skills or cash handling experience. *Id.* at

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[37] West's transferable skills analysis indicated that Claimant was a candidate for "direct placement or short term on the job training" for short order cook positions. EX 10 at 2. However, this analysis was based on a faulty premise that Claimant had cooking experience. Steven Cooley testified that without such experience Claimant would have "less access" to cooking jobs. EX 12 at 9-10. He added that "he still may have access to some entry level occupations associated with the restaurant industry," but did not indicate if Claimant was realistically able to secure and perform work as a cook (as opposed to waiter, etc.). EX 12 at 9-10.

[38] *E.g.*, Cooley stated that with respect to three light to medium duty positions (cafeteria worker, housekeeper, and maintenance worker), "we would have to more closely screen it to make sure that it was more light than medium." *Id.* at 11-12.

[39] Cooley's assertion that this job is suitable for Claimant because he has cash handling experience as evidenced by his prior convictions for the sale of drugs is not persuasive.

[40] One at Beachcombers by the Sea and another at Holiday Inn Sun-Spree in Panama City. EX 8.

26. Claimant has no relevant experience with computers, and the requirement for cash handling renders these jobs unsuitable for Claimant based on his prior criminal convictions.

Cooley also suggested a "host" job at a restaurant (Shuckers) in Panama City. The position involves greeting and seating guests, setting tables, changing linens, and general cleaning, and the position description reflects that restaurant experience is "preferred." EX 12 at 27. This job is unsuitable for at least three reasons. First, it conflicts with Claimant's medical restrictions, since, as Cooley acknowledged, the job duties require bending. *Id.* Second, it was apparently included based on Cooley's mistaken belief that Claimant had restaurant management and host experience and, despite Cooley's unreasonable suggestion that Claimant could "sell . . . as past experience" the fact that his family owned a restaurant, is not suitable for Claimant. *Id.* Third, the job is located in Panama City and, as noted above, is not realistically available to Claimant due to his lack of a valid driver's license.

Finally, I also find that the six jobs identified in Cooley's October 2, 2003 labor market survey do not constitute suitable alternate employment for Claimant. EX 12 at 28; EX 11.

A sedentary position identified in the survey as "interview clerk" at the Bay County Health Department requires knowledge of Windows-based computer programs, light data entry skills, and customer service experience. EX 11 at 1. This job is clearly unsuitable for Claimant since, as Cooley himself acknowledged, he does not have the required experience. *Id.* at 28.

Cooley also testified that a "light/medium" duty position identified in the survey as "maintenance worker" at Early Education & Care, Inc. involves lifting up to 50 pounds. He conceded that this position should also be eliminated from the list. EX 11 at 1.

Cooley further acknowledged that an "assistant manager" position at a convenience store required six months' experience in a similar position and should probably be eliminated based on Claimant's lack of experience. *Id.* He testified, however, that Claimant "would be a candidate assuming he didn't have to work in the medium level" of this "light/medium" job since it did not require a high school degree. EX 12 at 29, EX 11 at 2. As noted above, such uncertain testimony cannot meet the employer's burden to establish the availability of suitable alternate employment. *See Uglesich*, 24 BRBS at 180; *Davenport*, 16 BRBS at 199-200.

Cooley similarly acknowledged that a "baker's assistant" job would be inappropriate for Claimant given the light/medium level of work involved (with a 50 pound lifting requirement) and the fact that "transferring racks to and from [the] oven" would require bending. EX 11 at 2; EX 12 at 30.

With respect to a "production worker" position identified in the labor market survey at Shwinco Industries in Lynn Haven, Florida, that job is classified as light duty, and involves assembling aluminum windows, measuring and cutting aluminum, and utilizing small hand tools. EX 11 at 3. This job is incompatible with Claimant's physical restrictions inasmuch as Cooley testified that he is familiar with window production and believes that the position would involve bending. *Id.* Furthermore, this job description also states that a candidate must be able to read a measuring tape to within a 16^{th} of an inch and convert measurements into decimals. EX 11 at 3.

Cooley stated that he is not certain whether Claimant can do this.[41] As noted above, a vocational expert's uncertainty as to whether a job is within the claimant's intellectual capacity undermines the value of his testimony. *See Uglesich*, 24 BRBS at 180; *Davenport*, 16 BRBS at 199-200.

Finally, Cooley's survey lists an "assembly" position with the Agency for Workforce Innovation in Panama City, which is described as sedentary work. EX 11 at 3. Cooley noted that this job is probably light (rather than sedentary) work since it requires standing 80 percent of the time. EX 12 at 30. The job also involves production assembly of small parts, requires repetitive arm and hand movements, good vision, and finger dexterity, and training is provided. EX 11 at 3. Although the job may be compatible with Claimant's vocational profile (*i.e.*, his background, education, work experience, and physical restrictions), it is located in Panama City and is thus not reasonably accessible to Claimant due to his lack of a valid driver's license.

Based on all the foregoing, I find that Employer has failed to satisfy its burden of proving the availability of realistic job opportunities within the geographical area where Claimant resides, which he is capable of performing considering his age, background, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Accordingly, I further find that Claimant is totally and permanently disabled.

V. INTEREST

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp*., 10 BRBS 724 (1978). The Benefits Review Board and the federal courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Santos v. Gen. Dynamics Corp*., 22 BRBS 226 (1989); *Adams v. Newport News* Shipbuilding, 22 BRBS 78 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 26, 50 (1989); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988); *Perry v. Carolina Shipping*, 20 BRBS 90 (1987); *Hoey v. Gen. Dynamics Corp*., 17 BRBS 229 (1985); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom*. *Newport News v. Dir., OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board has stated that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimants whole, and held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the district director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the district director.

[41] Cooley's assertion that Claimant could probably perform these functions based on his likely familiarity with weights and measures, as demonstrated by his history in selling cocaine, is not persuasive.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Employer and Carrier shall pay to Claimant permanent total disability compensation from August 26, 1999 and continuing based on an average weekly wage of $369.18.

2. Employer and Carrier are entitled to a credit for all disability compensation previously paid to Claimant relating to his August 7, 1998 work-related injury.

3. Employer and Carrier shall pay interest on all past due compensation payments at the Treasury Bill rate in effect on the date this Decision and Order is filed by the District Director.

4. Pursuant to Section 7 of the Act, Employer and Carrier shall pay for all of Claimant's reasonable and necessary medical benefits relating to his August 7, 1998 work-related injury.

5. The district director shall perform all calculations necessary to effect this order.

6. Any petition for the allowance of attorney fees and costs must be prepared on a line item basis and in compliance with 20 C.F.R. § 702.132 and must be filed within 20 days after the service of this Decision and Order. Should a fee petition be filed, any objection shall be on a line item basis, stating the reasons for the objection, with explanation, and shall be filed within 10 days after receipt of the fee petition. Any item not objected to as directed shall be deemed without objection, and allowed. Within 10 days after receipt of any objection, Claimant's counsel may file a line item response.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.